(3) Supreme Court, U.S.
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No. 00-217

In the Supreme Court of the United States

SAMUEL L. LIEBER, M.D.
Plaintiff - Petitioner

vs.

CADDO LEVEE DISTRICT
BOARD OF COMMISSIONERS, ET AL.
Defendants - Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

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APPENDIX 2

Samuel L. Lieber	*	Number 290,553
Versus	*	First Judicial District Court
State of Louisiana, et al	*	Caddo Parish,Louisiana Section "C"

CONSOLIDATED WITH

Samuel L. Lieber	*	Number 420,225
Versus	*	First Judicial District Court
State of Louisiana, et al	*	Caddo Parish, Louisiana Section "C"

Written Findings of-Eact and Reasons For Judgment

This court has discovered a pleading filed by plaintiff on October 30, 1998, which was not provided to the court at the time it was filed. Based upon the certificate of service, a copy of the filing wag provided to opposing counsel. The pleading is styled "Second Supplemental Memorandum and Amended Petition In Support of Motion To Vacate Judgment On Defendant's Exception Of No Cause of Action To Plaintiff's Petition For Relative Nullity". The pleading purports to amend the plaintiff's original Petition for Nullity and to have this court answer a series of questions.

This court has treated this filing as the plaintiff's amendment to his Petition for Nullity (the merits of which are addressed in this court's ruling on defendant's Motion for Judgment on Pleadings and/or Motion for Summary Judgment), and as a request for written findings of fact and

reasons for judgment pursuant to Louisiana Code of Civil Procedure Article 1917.[1]

Listed below are the salient facts:

1) plaintiff's Petition for Nullity seeks to set aside the judgment of this court rendered in suit number 290,553, on November 22, 1995. That judgment was affirmed by the Second Circuit Court of Appeal, and became final following the denial of write and a request for rehearing by the Louisiana Supreme Court

2) that the petition for nullity does not allege vices of form as contemplated by Louisiana Code of Civil Procedure Article 2002;

3) that Louisiana Code of Civil Procedure Article 2003 is not applicable in this instance;

4) that the petition for nullity does not allege facts supporting fraud or ill practices as contemplated by Louisiana Code of Civil Procedure Article 2004, and;

---

[1] This court's ruling on the Exception of No Cause of Action was signed and filed on October 16, 1998. Article 1917 requires that any request for written findings of fact and reasons for judgment must be filed within ten days of the judgment. While the plaintiff is request is not timely in that regard, this court deems it appropriate to provide the relief requested.

5) there is no evidence that any facts alleged by plaintiff were not present in the record at the time this matter was considered by the appellate courts.

It is clear from the record presented, and particularly the extensive filings by plaintiff, that the plaintiff simply disagrees with the law as applied by the courts. While such a difference of opinion may be respected, it does not alter the proper application of Louisiana law.

Plaintiff's original and amended petitions for nullity fail to state a cause of action from which relief may be granted under Louisiana law. For this reason, the claims made by the Petition for Nullity were dismissed, with prejudice, at plaintiff's cost.

Dated in chambers on this 6th day of January, 1999.

/s/ Frank H. Thaxton, III
Frank H. Thaxton, III
District Judge

APPENIDIX 3

Judgment rendered December 8, 1999. Application for rehearing may be filed within the delay allowed by art. 2166. La. C.C.P.

No. 32,551-CA
(consolidated with)
No. 32,552-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

SAMUEL L. LIEBER Plaintiff-Appellant

Versus

CADDO LEVEE DISTRICT BOARD OF COMMISSIONERS, ET AL Defendants-Appellants

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court Nos. 290,553 and 420,225

Honorable Frank H. Thaxton, III, Judge

* * * * *

SAMUEL L. LIEBER, M.D. In Proper Person

WIENER, WEISS & MADISON
By: Neil T. Erwin

BERTRAND & SOILEAU Counsel for Defendants-Appellees

* * * * *

Before BROWN, PEATROSS and DREW, JJ.

DREW, J.

Sam Lieber appeals a judgment dismissing his petition for nullity. We affirm.

FACTS

This litigation, which has been ongoing for over 17 years, involves a 2.09 acre tract of land owned by Lieber which is near the intersection of Youree Drive (Highway 1) and Kings Highway in Shreveport. In the early 1950's, DOTD, began a project extending Youree north from its intersection with Kings. In 1953, DOTI) entered into an agreement with appellant's father, Philip Lieber, who owned the tract at the time, for the transfer of a right-of-way over the 2.09 acre tract in exchange for $2,500. In 1966, Philip Lieber transferred his ownership interest in the tract to appellant.

PROCEDURALBACKGROUND

Suit No. 290,553

Lieber. as a pro se plaintiff, filed suit in 1982 for a declaratory judgment to determine ownership of the Youree tract and several other tracts of land. He amended his petition in 1985 to allege that the right-of-way agreement was invalid. Lieber eventually retained counsel who filed amended petitions between 1988 and 1991. The trial court ruled in 1994 that the 1953 right-of-way deed was null and void because DOTD, had been required in 1953 to take the property in fee simple. This court affirmed the judgment and remanded for trial on the issue of damages. *See Lieber v. Caddo Levee Dist. Bd. Of Com'rs*, 27,267 (La. App. 2d Cir

8/23195), 660 So. 2d 188, *writ denied*, 95-2355 (La. 12/8/95), 664 So. 2d 427.

DOTD filed exceptions of prescription and no right of action to Lieber's claim for damages. The trial court sustained the exception of prescription. This court amended the judgment to declare that DOTD) did not have a possessory interest in the portion of the tract not used in the construction and maintenance of the highway, and affirmed the judgment as amended. *See Lieber v. State, Dept. of Transp. and Development*. 28,745 (La. App. 2d Cir. 10/30/96), 682 So. 2d 1257, *writ denied*, 97-0087 (La. 3/7/97), 689 So. 2d 1374, reconsideration denied, 97-0087 (La. 4/18/97), 692 So. 2d 431. Lieber was represented by Neil Erwin on the two prior appeals.

Suit No. 420,225

On December 6, 1996, under civil docket #420,225, Neil Erwin filed on behalf of Lieber a petition for permanent injunction for return of property or, in the alternative, for damages. On August 29, 1997, Erwin filed a "First Amended Petition, With Additional Petition for Nullity Filed in Proper Person." Lieber filed his "petition" seeking to annul the judgment declaring that his claim for damages had prescribed. Upon DOTD's motion, the trial court ordered the consolidation of suit nos. 290,553 and 420,225. The trial court later granted Lieber's motion to sever the petition for nullity.

DOTD filed the exception of no cause of action on June 12, 1998. The trial court rendered judgment on June 29, 1998, sustaining the exception of no cause of action and allowing Lieber 15 days to amend his pleadings to state a

cause of action. The trial court vacated this judgment because Lieber maintained he did not receive notice of the filing of the exception or the setting of the exception for hearing. On October 16, 1998, the trial court again rendered judgment sustaining the exception of no cause of action and giving Lieber 15 days to amend his pleadings to state a cause of action.

On November 16, 1998, DOTD filed a motion for judgment on pleadings and/or summary judgment on the petition for nullity. On December 10, 1998, Lieber filed a motion for judgment on the pleadings and/or summary judgment on his petition for nullity.

Rendering judgment on January 6, 1999, the trial court granted DOTD's motion for judgment on the pleadings and/or motion for summary judgment because Lieber failed to amend his petition for nullity with any substantive facts which would state a cause of action.

Lieber bases his appeal on several grounds. First, he argues that the courts failed to address the implication of La. C.C. art. 2033, which he contends renders his damage claim imprescriptable. Second, Lieber maintains that he has discovered a "new legal basis" for his damages claim precarious possession under La. C.C. art. 3477. Lieber complains that the trial and appellate courts should have taken judicial notice of this article. Lieber states in his brief that the "failure of the previous courts to apply clear law constitutes a vice of substance and ill practice[.]" Third, Lieber contends that the use of La. R. S. 13:5 111 and 19:14 by this court in the second appeal "constitutes an ill practice" which was repeated by the denial of rehearing, the supreme court's refusal of his writ application and the trial court's refusal to

consider this argument. Finally, Lieber argues that the trial court failed to properly address La. C.C.P. art. 2005.

DISCUSSION

Application of La. CC. art. 2033

Lieber argues that the judgment should be annulled because this court failed to address the application of La. C.C. art. 2033 when affirming the judgment dismissing his claim for damages. Of course, by arguing that the judgment should be annulled because this court failed to consider Article 2033, Lieber is essentially arguing that Article 2033 favors him, and thus, this court was legally wrong in affirming the judgment.

A judgment cannot be annulled merely for being legally wrong. The correctness of the judgment must be questioned on appeal. *Goodson v. Sills*, 470 So. 2d 966 (La. App. Ist Cir.- .1985). See also *Hall v. Hall*, 611 So. 2d 173 (La. App. 5th Cir. 1992); *Wilson v. Central Gulf Lines, Inc.* 583 So. 2d 1164 (La. App. 4th Cir. 199 1), writ denied. 590 So. 2d 79 (La. 199 1). Lieber is prohibited from using a petition for nullity under La. C.C.P. art. 2004 as a second appeal of the judgment dismissing his prescribed claim for damages. Regarding La. C.C.P. art. 2004, our supreme court has stated:

> The action provided by this article is not a substitute for an appeal from a judgment that might be erroneous due to insufficiency of evidence or misinterpretation of substantive law, but, rather, is a separate remedy designed to afford relief against a judgment procured by methods viewed with disdain by the judiciary.

Smith v. Cajun Insulation, Inc., 392 So. 2d 398 (La. 1980). Lieber is obviously dissatisfied with the outcome of his previous appeal. However, he cannot now resort to a petition to annul as a vehicle to revisit issues previously presented to this court in the same litigation. Lieber is not entitled to continue retrying his case until he is satisfied with the outcome.

Newly Discovered Law

Lieber urges that the judgment should be annulled because he has discovered a civil code article which he believes is favorable to him, namely Article 3477. Lieber also accuses the courts of failing to take judicial notice of this article.

A party seeking annulment of a judgment must demonstrate how he was prevented or excused from asserting any defenses he may have had, i.e., that he was deprived of the knowledge of the existence of the defense relied on, or of the opportunity to prevent it, by some fraud or ill practice on the part of the other party. *Gramm v. Brock*. 430 So. 2d 199 (La. App. 2d Cir. 1983).

Lieber does not explain how he was prevented from asserting Article 3477 in the earlier action as a defense to prescription. We note that while Lieber filed as as a *pro se* appellant on this appeal, he had benefit of counsel during the prior appeal. We further note that his counsel. Neil Erwin. who filed the initial petition and the "First Amended Petition. With Additional Petition for Nullity Filed in Proper Person" in the second suit (#420,225), appeared on behalf of Lieber for oral argument on this appeal. Lieber is simply not entitled to retry his case each time he "discovers" law which

he feels may be favorable to him.

III Practices

Lieber insists that this court committed "ill practices" by relying on La. R.S. 13:5 111 and 19:14 as a basis for its resolution of the prior appeal. La. C.C.P. art. 2004 provides that a final judgment obtained by fraud or ill practices may be annulled. An "ill practice" is any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right. *Morehead v. Ford Motor Co.*, 30,207 (La. App. 2d Cir. 2/25/98), 709 So. 2d 861. A court's consideration of the law, even if done erroneously, can in no way be construed as an "ill practice." As we have stated earlier in this opinion, Lieber cannot utilize a petition to annul to again question this court's rationale in a previous appeal.

Application of La. C.C.P. art. 2005

Lieber argues that the trial court misapplied La. C.C.P. art. 2005, which provides, in part:

> A judgment affirmed, reversed, amended, or otherwise rendered by an appellate court may be annulled only when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court.

Lieber apparently believes that Article 2005 offers *grounds* for annulment, as he states in his brief:

> Under Art. 2005, a judgment rendered by an appellate court may be annulled either when the ground

for nullity was not considered by the appellate court (applicable to La. C.C. art. 2033), or did not appear in the record (La. C.C. Art. 3477). Instead. the District Court, in its written reasons for judgment, both ignored Art. 2005 and erroneously stated that "There is no evidence that any facts alleged by plaintiff were not present in the record at the time this matter was considered by the appellate court." Under C.C.P . Art. 2005, the test is not limited to a basis for nullity finding of whether facts alleged as a basis for nullity were part of the previous court record (Which Dr. Lieber's arguments on precarious possession were not), but also whether the ground for nullity was not considered previously by the app ellate court. In the important instance of C.C. Art. 2033, while it specifically was pled by Dr. Lieber, there is no record that this statute ever was considered d by the prior appellate court, when its application would have reverse the erroneous finding on prescription by the prior court.

Article 2005 does not supply an independent ground, outside of La. C.C.P. arts. 2002 and 2004, to annul a judgment. Rather, it simply precludes annullment of a judgment when the ground for nullity appeared in the record of appeal or was considered by the trial court. Thus, Article 2005 simply governs when a judgment can be annulled if the action has already been disposed of on appeal, as in this matter.

DECREE

At appellant's cost, the judgment is AFFMMED.

APPENDIX 4

SUPREME COURT 3/20/2000
STATE OF LOUISIANA

DOCKET NUMBER 2000-C-561

SAMUEL L. LIEBER, M.D.
PLAINTIFF - APPELLANT

VERSUS

CADDO LEVEE DISTRICT BOARD OF COMMISSIONERS, ET. AL.
DEFENDANTS - APPELLEES

On Application for Write of Certiorari or Review to the
Louisiana Court of Appeal,
Second Circuit, No. 32,551-CA
(consolidated with No. 32,552-CA),
On Appeal from the First Judicial District Court,
Parish of Caddo,
Nos. 290,553 and 420,225
Frank H. Thaxton, III, Presiding

RNBUTTAL BY PLAINTIFF/APPLICANT TO OPPOSITION MEMORANDUM OF DEFENDANT/RESPONDENT STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

RESPECTFULLY SUBMITTED,

SAMUEL L. LIEBER, M.D.
IN PROPER PERSON
325 GLEN ERICA
SHREVEPORT, LOUISIANA 71106

REBUTTAL BY PLAINTIFF/APPLICANT TO OPPOSITION MEMORANDUM OF

DEFENDANT/RESPONDENT STATE OF LOUISIANA,

DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

MAY IT PLEASE THE COURT:

Plaintiff /Applicant, Samuel L. Lieber, M. D. , in proper person files this rebuttal to the opposition Memorandum of Defendant/Respondent State of Louisiana, Department of Transportation & Development (DOTD).

1. THIS WRIT--APPLICATION IS NOT FRIVOLOUS

DOTD wrongfully characterizes this writ application as "frivolous," without any foundation for this charge. As has been pointed out by Plaintiff/Applicant, his rights have been deprived in such a manner (such as the imposition of a St. Julien servitude by the Second Circuit Court of Appeal on its on and without any opportunity for the assertion of a defense by Plaintiff/Applicant) that a suit for nullity is the only avenue available to Plaintiff /Applicant. If this legal avenue is provided by statute, Plaintiff/Applicant is well within his rights to utilize it, since it represents the expression of the will of the citizens of this state expressed through their legislature.

2. FAILURE OF THE COURTS TO APPLY LAW (LA. C.C. ART. 2033) WHICH WOULD HAVE DISPOSED OF THE CASE IN A MANNER OPPOSITE TO THAT AS DECIDED FALLS WITHIN THE EXPANDED DEFINITION OF " ILL PRACTICE"

Plaintiff/Applicant has stated a cause of action for nullification under the expanded definition of an "ill practice" under the Louisiana Code of Civil Procedure:

> "The jurisprudence outlines two criteria for the determination that a judgment has been obtained through fraud or ill practices, namely (1) when the circumstances under which the judgment was rendered show the deprivation of the legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable."
>
> . . .
>
> "Each case must be viewed according to its own peculiar circumstances."
> Morehead v. Ford Motor Co., 709 So.2d 861, at 864 - 865 (La. App. 2 Cir. 1998)

Counsel for DOTD admits in his opposition Memorandum that: there is a "lack of direct reference to [La. C.C. Art. 20331 in the appellate opinion.,, (DOTD Opposition Memorandum, p. 5.)

How else, then, is Plaintiff/Applicant able to reverse the application of wrong law in this case except by filing this action for nullity? Failure to apply the right law (C.C. Art. 2033) is the same as the application of wrong law. Use of wrong law is the same as if Plaintiff /Applicant were to

apply the wrong medicine to one of his patients - the end result is the wrong result!

> "The law no longer requires that the alleged fraud or ill practice be on the part of the party in whose favor the judgment was rendered."
> Morehead v. Ford Motor Co., supra, at 864.

Previous courts ruled, as a matter of res judicata, that C. C. Art. 2032 applied, thereby both making the right of way over the property of Plaintiff /Applicant null (a point agreed to by DOTD through its counsel), and requiring the application of C. C. Art. 2033, which is not subject to prescription. However, C. C. Art. 2033 has been ignored by all courts, a point admitted by DOTD through its own pleadings.

Moreover, this law, which otherwise would have determined the case in a manner opposite to that as decided, comes directly within the definition of C.C.P. Art. 2005 in that it constitutes a ground for nullity that was not considered by the appellate Court.

For the same reason, Plaintiff/Applicant is able to raise the failure of the courts to apply C.C. Art. 3477, dealing with precarious possession, which neither was in the record of appeal nor considered by the appellate court.

3. WHILE THIS MAY BE THE THIRD "APPEAL" OF PORTIONS OF THIS CASE, IT IS THE FIRST OPPORTUNITY TO CORRECT THE MISSTATEMENT OF LAW BY THE APPELLATE COURT IN THE OPINION NOW UNDER APPEAL

A Petition for Nullity is not considered an "appeal, 11 and can be filed prior to any appeal or at any time thereafter. Therefore, while this is the third time that this Court has been asked to review portions of this case, this is the first appeal arising from Plaintiff/Applicant's permitted utilization of a suit for nullification.

La. C.C.P. Art. 2005 calls for an erroneous judgment rendered by an appellate court to be annulled when the ground for nullity either (A) did not appear in the record of appeal, or (B) was not considered by the Appellate court. However, this principle of law is misstated in the opinion of the Second Circuit Court of Appeal which is the subject of this writ application. Judge Drew writes:

> "it . . . [La. C.C.P. art. 20051 precludes annulment of a judgment when the ground for nullity appeared in the record of appeal or **was considered by the trial court**." (Emphasis added.)

This mistatement changes the meaning of the law entirely. The failure of the courts to apply La. C.C. Art. 2033 was raised, but, by DOTD's own Admission, there is no evidence that this pertinent law ever was considered by the appellate court. Therefore, C.C.P. art. 2005 must apply as the safeguard imposed by the legislature on appellate courts to correct errors just like this.

This misstatement of law Must be reversed through action by this Supreme Court, a point which DOTD does not even address in its Opposition.

4. THE IMPOSITION OF A ST. JULIEN SERVITUDE ON PLAINTIFF/APPLI CANT'S PROPERTY BY THE APPELLATE COURT VIO LATES DEFENDANT/APPELLANT'S OWN READING OF THE LAW

DOTD argues that Plaintiff/Applicant must show that he was prevented from asserting a defense in order to prevail in his action of nullity. While disagreeing with this limitation, Plaintiff /Applicant shows that the imposition of a St. Julien servitude on his property by the Second Circuit Court of Appeal comes squarely within this reading of the law. The reason is that the Second Circuit imposed the St. Julien servitude on its own volition after oral argument had been heard and the case submitted for decision.

Therefore, Plaintiff /Applicant was prevented from asserting his defense, namely, that under the facts of this case, a St. Julien servitude could not be applied because (A) such a servitude requires that no payment be made by DOTD, when one was here, and (B) a St. Julien servitude requires good faith and the evidence shows DOTD to be in bad faith. This defense could not be raised with the Trial Court - it was not an issue that was before the Trial Court.. Further, Plaintiff/Applicant was prevented from asserting this defense to the appellate court because the court never gave notice that it was an issue to be decided by that court until it was too late for argument. The appellate court compounded the error by denying Plaintiff/Applicant's motion for rehearing. Further, C.C. Art. 3477 prevents any prescription by a precarious possessor.

Courts have an obligation to apply correct law and to assign reasons for their decisions. Neither was done in this case as to the errors assigned. Accordingly, this Court must grant Plaintiff/Applicant's writ application to reverse the errors of law in this case.

Respectfully submitted,

/s/ Samuel L. Lieber, M.D.
Samuel L. Lieber, M.D.
In Proper Person

APPENDIX 5

The Supreme Court of the State of Louisiana

SAMUEL L. LIEBER, M.D.

vs. NO. 2000-C-0561

CADDO LEVEE DISTRICT BOARD OF COMISSIONERS, ET AL

IN RE: Lieber, Samuel L. M.D.; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Caddo, 1st Judicial District Court Div. E, Nos. 290,553, 420,225; to the Court of Appeal, Second Circuit, No(e). 32,552-CA, 32,551-CA

April 7, 2000

Denied.

CDT

PFC

WFM

HTL

CDK

BJJ

JTK

VICTORY, J., not on panel; recused.

Supreme Court of Louisiana
April 7, 2000
/s/ Rai T. Daigle
Deputy Clerk of Court
For the Court

APPENDIX 6

SAMUEL L. LIEBER	*	NUMBER: 290,553
VERSUS	*	1ST JUDICIAL DISTRICT
	*	COURT
CADDO LEVEE	*	CADDO PARISH,
DISTRICT BOARD	*	LOUISIANA
OF COMMISSIONERS,	*	
ET AL	*	

OPINION

In 1953, Philip Lieber conveyed a right-of-way deed to the Department of High ways now the Department of Transportation and Development, for the construction of a highway project 53-09-04 located at the intersection of Youree Drive and Kings Highway. In 1966, Philip Lieber conveyed the full ownership of the same property to Dr. Samuel Lieber, his son. Dr. Lieber later filed suit to determine the true title owner and holder of the property.

Before this court are both plaintiff Is and defendant's motions for partial summary judgment, in which each party asserts that the threshold issue to be resolved by this court is whether the state improperly acquired the property in question and whether this renders the right-of-way deed invalid.

The plaintiff argues that the 1953 right-of-way deed is an absolute nullity because the state violated La. R.S. 48:312, as effective in 1953, when it acquired a servitude on the property rather than acquiring the property in full ownership as required by the statute. In opposition, the defendant argues that La. R.S. 48:312 is inapplicable because the Kings Highway Project was not a limited access highway project and there was no indication, at the time of the filing of the plaintiff's original motion for partial summary

judgment, that the Kings Highway Project was a limited access one. Additionally, defendant contends that the applicable statute in this case is La. R.S. 48:217. This statute authorized the state to acquire a servitude, in addition to fee simple title, when acquiring property in connection with state highway projects. The apparent conflict between the two statutes must first be examined.

ISSUE I

The pertinent portion of La. R.S. 48:312, enacted in 1944, states:

> Section 5. ACQUISITION OF PROPERTY AND PROPERTY RIGHTS. For the purposes of this act, the Department of Highways of the State may acquire private or public property and property rights for limited-access facilities and service roads, including rights of access, air, view and light, by gift, devise, purchase or condemnation in the same manner as it is now or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets. All property rights acquired under the provisions of this act **shall be in fee simple**.

(Emphasis added.)

La. R.S. 48:217, enacted earlier in 1942, also states:

> The department may, without any competitive bidding, acquire, any immovable property, or the use thereof, **including servitudes**, lands, and improvements on lands, **necessary for the right of way of any highway included in the state highway system**

> or any appurtenance thereto or for any of the purposes of this Chapter by expropriation, by donation, by purchase, by exchange, or by lease.

(Emphasis added.)

Although Sec. 217 appears to be in direct conflict with Sec. 312 because it permits the acquisition of property in any manner necessary for construction of the highway, Sec. 312 was enacted in 1944, some two years after Sec. 217 was enacted. The Louisiana Supreme Court has held that "a subsequent general statute dealing specifically with a particular subject supersedes and repeals inconsistent and conflicting provisions in an earlier statute." Macon v. Costa, 437 So.2d 806 (La. 1983). Thus, Sec. 312, the later statute, supersedes and repeals the inconsistent language in Sec. 217.

ISSUE II

The Department contends in its motion in opposition that even if Sec. 312 is the applicable statute, there is no evidence or documentation that the highway project in question, No. 53-09-04, was a limited access highway as required by the statute. The Department further argues that the plaintiff Is reliance on State v. Bessie H. Barrow No. 115,708 (1st Jud. Dist. Ct. Nov. 20, 1953), is not sufficient evidence to substantiate the claim that the project referred to in the original right-of-way deed was a limited access highway and the same highway in the Barro case. Since the filing of the original briefs in this case, evidence has been adduced by the plaintiff to further support the claim that Project No. 53-09-04, referred to in the deed executed by Philip Lieber, was a limited access highway and the same project held to be a limited access highway in the Barrow

case.

First, the right-of-way deed executed by Philip Lieber conveying a servitude on the property to the state specifically refers to state highway project No. 53-09-04. The instrument states in pertinent part:

> BE IT KNOWN, THAT I, PHILIP LIEBER, husband of Mrs. Clara Lowenstein Lieber, of the age of majority and a resident of Caddo Parish, Louisiana, in consideration of the benefits, , uses and- advantages accruing to me by reason of the location of the STATE PROJECT 53-09-04, BROADMOOR-SHREVEPORT HIGHWAY, STATE ROUTE 20, CADDO PARISH, . . . do hereby grant, and deliver unto the state of Louisiana and the Department of Highways of the state of Louisiana, . . . a right of way on, over and across the following described property, to wit: [the Kings Highway Property].

(Emphasis added.)

Although the deed does not expressly state whether Project No. 5309-04 is a limited access highway, further evidence to support that claim can be found in the briefs and opinion filed in State v. Barrow, supra. In Barro , the Department of Highways sued on August 15, 1953 for full ownership of five parcels of land for the construction of the Youree Drive Extension Project. Similarly, the defendant owners of the property asserted that the plaintiff Department only needed a servitude for the construction of the highway and not full ownership.

In its petition filed in the Barrow case, the Department of Highways stated that it intended to construct in the city of Shreveport "a certain project known as State Project No. 53-09-04, which project is for the construction of the Broadmoor-Shreveport Highway. . . . and said Broadmoor-Shreveport Highway begins at the junction of Youree Drive with Kings Highway . . ." Additionally, in its original brief in the Barrow case, the Department further argued that [T]he proposed highway is a limited access facility because Mr. Bryan, [Assistant Road Design Engineer for the Department of Highways,] said it was, because the defendant failed to show it wasn't, because Exhibits P-6 through P-56 show that it is, and because the Legislature has said that a highway so designed is a limited access facility." See Plaintiff's Exhibit Nt p. 1-2. This statement in the Department's brief is followed by a footnote reference to Sec. 312, the same statute that is the subject of the instant litigation.

Furthermore the court held in the Barrow case that "the highway to be built over defendant's land (Noe 53-09-04] is defined to be a limited access road and, under Revised Statute 48:312, the Legislature required that all property rights acquired under the provisions of this part shall be in full-ownership." Larrow, supra I at 3. The Department's own admissions and the court's opinion make it clear that No. 53-09-04 was a limited access highway and, as such, the state was under an obligation to acquire full ownership of the property rather than a servitude.

Because the state failed to acquire the subject property in such a manner, and has produced no evidence to counter plaintiff's claims that the highway project in question was a limited access one, this court, pursuant to La.

C. C. Art. 2030, must find that the right-of-way deed executed by the parties is null and void as violating public order. "A valid contract must have a lawful cause. . . .The cause of an obligation is unlawful when it is in violation of the law or contra honos mores or against public order or public policy." Johnson v. Kilpatrick, 569 So.2d 669 (La. App. 2 Cir. 1990). The declared legislative, intent of Sec. 312 was to insure that property for the purpose of a limited access highway was to be acquired in fee simple. To allow the state to do anything less, even some forty years later, would be in contravention of the stated legislative intent.

For the foregoing reasons, the plaintiff's motion for partial summary judgment on the issue of ownership is GRANTED and the defendant's motion is DENIED. The remaining issue to be resolved by the court is the extent to which the property in question has been damaged or taken by the actions of the state and whether the owner is entitled to compensation, and in what amount, for such loss.

Dated in chambers on this 30th day of March, 1994.

/s/ Frank H. Thaxton, III
FRANK H. THAXTON, III
DISTRICT JUDGE

APPENDIX 7

Judgment rendered August 23, 1995
Application for rehearing may be
filed within the delay allowed by
Art. 2166, LSA-CCP.

No. 27,267-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

SAMUEL L. LIEBER — Plaintiff-Appellee

versus

CADDO LEVEE DISTRICT BOARD OF COMMISSIONERS, ET AL — Defendant-Appellant

* * * * *

Appealed from the First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 290,553

Honorable Frank H. Thaxton, Judge

* * * * *

BERTRAND & SOILEAU
BY: Ronald J. Bertrand — Counsel for Appellant, State of Louisiana, Department of Transportation and Development

WIENER, WEISS, MADISON & HOWELL
BY: Neil T. Erwin — Counsel for Appellee, Dr. Samuel L. Lieber

* * * * *

Before MARVIN, NORRIS, and LINDSAY, JJ.

LINDSAY, Judge

The State, through the Department of Transportation and Development (DOTD), appeals a trial court judgment holding that a 1953 right-of-way deed, obtained for a limited-access highway project, was null and void because the Department of Highways was then statutorily required to take the property in fee simple, instead of merely obtaining a servitude. For the reasons assigned below, we affirm.

FACTS

In 1953, a state project in Shreveport was undertaken to extend Youree Drive about two miles north from its intersection with Kings Highway. Phillip Lieber owned a 2.09-acre tract of land near the intersection of Youree and Kings which was used as a levee.[1] As part of the extension project, the levee was eventually moved from this tract and relocated on the east side of the newly extended Youree Drive.

On May 21, 1953, Mr. Lieber and the Louisiana Department of Highways (the predecessor of the DOTD) entered into a right-of-way agreement, whereby Mr. Lieber transferred a right of way over the entire tract in exchange for $2,500.00. The document showed that only a servitude was granted and that there was no conveyance of fee title.

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[1] In brief, the DOTD acquiesced, for purposed of te cross-motions for partial summary judgment, that the 2.09 acre-tract was necessary for use by the state in construction of a limited-access highway.

In 1955, Mr. Lieber began trying to get the DOTD to relinquish the servitude over the portion of the tract not actually used in construction of the roadway. In particular, he wished to be able to use the portion of his property which the state alowed others to use for such enterprises as annual Christmas tree sales. His efforts were unsuccessful. In 1966, he conveyed his full ownership interest in the property to his son, Dr. Samuel Lieber, the present plaintiff. In 1982, Dr. Lieber filed the instant suit. Among the defendants was the DOTD.

In 1990, the plaintiff filed a motion for partial surnmary Judgment, seeking a declaration that the right-of-way deed was invalid and null. The motion was denied. In 1993, he re-asserted the motion. At that time, the DOTD also filed a motion for partial summary judgment, requesting that the document be declared valid.

In April of 1994, the trial court rendered a written opinion in which it ruled that the right-of-way deed was null and void, The trial court found that former LSA-R.S. 48:312, as enacted in 1944, required that all property rights acquired by the DOTD, for limited-access facilities and service roads "shall be in fee simple." Furthermore, the trial court ruled that this statute superseded and repealed inconsistent language in LSA-R.S. 48:217 (enacted in 1942), which allowed the state to acquire any im movable property or the use thereof, including servitudes, for the right of way in any state highway system by expropriation, donation, purchase, exchange or lease. In so ruling, the trial court relied upon the position taken by the Department of Highways in *State Through Dept. of Highways v. Barrow*, 238 La. 887, 116 So.2d 703 (1959), which dealt with another tract involved in the same highway project. In its

trial court pleadings in the *Barrow* case, the Department had contended that it was **required** under LSA-R.S. 48:312 to take the property of an uncooperative landowner in full ownership, rather than obtain a servitude or right of way.

Therefore, the plaintiffs motion for partial summary judgment was granted, and the DOTD's motion for partial summary judgment was denied.

The DOTD filed a Writ application, which was converted into an appeal. The narrow issue presented for review in this appeal is whether the Department of Highways was authorized to take a servitude for a limited access highway in 1953.

STATUTES

LSA-R.S. 48:217 was added by Acts 1942, No. 4, Section 47. It provided, in pertinent part:

> The Department of Highways shall have the power and authority, without any competitive bidding, to acquire any and all immovable property, or the use thereof, including servitudes, lands, and improvements on lands, necessary for the right of way of any highway included in the State highway system or any appurtenance thereto or for any of the purposes of this Act, either by expropriation, as herein provided, by donation, by purchase, by exchange, or by lease. [Emphasis added.] [2]

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[2] Although subsequently amended on several occasions, LSA-R.S. 48:217 still contains essentially the same language as quoted.

Former LSA-R.S. 48:312, pertaining to limited-access highways, was added by Acts 1944, No.67, Section 5. Its relevant provisions stated:

> For the purposes of this act, the Department of Highways of the State may acquire private or public property and property rights for limited access facilities and service roads, including rights of access, air, view and light, by gift, devise, purchase, or condemnation in the same manner as it is now or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets. All property rights acquired under the provisions of this act shall be in fee simple .... [Emphasis added.] [3]

For purposes of our discussion, Acts 1944, No.67 contained two other noteworthy provisions, which provided in pertinent part:

> Section 3. AUTHORITY TO ESTABLISH LIMITED-ACCESS FACILITIES. The Department of Highways of the State is hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain and provide limited-access facilities for public use wherever such authority is of the opinion that traffic conditions, present or future, will Justify such special facilities: Provided, That within cities and villages such authority shall be subject to such municipal consent as may be provided by law. **Said Department of Highways, in addition to the specific powers granted in this act, shall also have**

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3 This statute was repealed by Acts 1955, No. 129. That act added LSA-R.S. 48:303, which allows highway authorities to "acquire any use of the property or the full ownership of it" for controlled-access facilities; this statute will be discussed further, *infra.*

> **and may exercise, relative to limited-access facilities, any and all additional authority now or hereafter vested in it relative to highways or streets within its jurisdiction.** Said Department may regulate, restrict, or prohibit the use of such limited-access facilities by the various classes of vehicles or traffic in a manner consistent with Section 2 of this act. [Emphasis added.] [4]
>
> * * *
>
> Section 12. SEVERABILITY .... All laws or portions of laws inconsistent with the policy and provisions of this act are hereby repealed to the extent of such inconsistency in its application to limited-access facilities provided for in this act. [Emphasis added.]

Neither LSA-R.S. 48:217 nor LSA-R.S. 48:312 was amended before 1953, when the Department of Highways obtained the servitude on the Lieber property.

STATUTORY CONSTRUCTION

LSA-C.C. Art. 13 provides that "[l]aws on the same subject matter must be interpreted in reference to each other." When dealing with conflicting statutes on the same subject matter, this article makes it the court's duty to harmonize and reconcile the acts if possible, *State in Interest of A.C.*, 93-1125 (La. 1/27/94), 643 So.2d 719.

Rules of statutory construction provide that where

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4 This section eventually became part of LSA-R.S. 48:301. No case has construed the relevant, highlighted language.

two statutes deal with the same subject matter, they should be harmonized if possible. However, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Delta Development Company, Inc. v. Plaquemines Parish Commission Council*, 451 So.2d 134, 138 (La. App. 4 th Cir. 1984), writ denied, 456 So.2d 172 (La. 1984); *State ex rel. Bickman v. Dees,* 367 So.2d 2-83, 291 (La. 1978).

Where the later special statute is riot irreconcilable with the general statute to the degree that both statutes cannot have a coincident operation, the general statute will not be repealed; the special statute will exist as an exception to its terms. *Macon v. Costa*, 437 So.2d 806, 813 n. 14 (La. 1983). Furthermore, laws are presumed to be passed with deliberation and with full knowledge of all existing laws on the same subject. *Winston v. Orleans Parish School Board,* 545 So.2d 1174 (La. App. 4th Cir. 1989), writ denied, 550 So.2d 631 (La. 1989).

The court in *Hayden v. Rich and Parish School Board,* 554 So.2d 164, 167 (La. App. 2d Cir. 1989), writ denuied, 559 Sr.).2d 124 (La. 1990), discussed statutory construction as follows:

> The construction of a particular statute which creates a statutory inconsistency should be avoided when an interpretation can be adopted which will not do violence to the plain words of an act. The legislature is presumed to have enacted each statute with deliberation and with full knowledge of all existmig laws on the same subject. The meaning and intent of the statutory provision, therefore, is to be determined by a consideration of the statute in its entirety and all

other laws on the same subject matter and a construction should be placed on the provision in question which is consistent vith the express terms of the statute and with the obvious intent of the legislature in enacting it. It is reasonable to conclude therefore that the legislature, in passing a statute, did not intend to abrogate any prior or law relating to the same subject matter unless the repugnancy betw een the two is irreconcilable. Prior laws are repealed by subsequent lavs only in the case of positive enactment or clear repugnancy and nothing short of irreconcilable conflict between two statutes works a repeal by implication.

DISCUSSION

The DOTD argues that the trial court erred in finding that the right-of-way deed was invalid. It argues that LSA-R.S. 48:312 was only one method by which it was entitled to take property for a luighway project and that it was equally acceptable for the DOTI) to obtain only a servitude instead of full ownership. In support of its argument, the DOTD refers to the wording of Acts 1944, No.67, Section 3, specifically the following: "Said Department of Highways, in addition to the specific powers granted in this act, shall also have and may exercise, relative to limited-access facilities, any and all additional authority now or hereafter vested in it relative to highways or streets within its Jurisdiction."

However, the plaintiff contends that Section 3 of the Act only pertained to the authority to "plan, designate, establish, regulate, vacate, alter, improve, maintain and provide" limited-access highways, not to the acquisition of property rights for such highways, which was discussed in

Section 5. He also relies upon Section 12 of Acts 1944, No.67, quoted supra, pertaining to the repeal of inconsistent laws.

We agree with the plaintiff and hold that I he trial court properly found that LSA-R.S. 48:312, a special statute address ing limited-access highways, superseded LSA-R.S. 48:217, the general highway statute, and implicitly repealed its conflicting provisions insofar as they concerned limited-access highways. We are unable to harmonize the two provisions; to read them together essentially eliminates the mandate in LSA-R.S. 48:312 that "[a]ll property rights acquired under the provisions of this act **shall** be in fee simple." Section 3 of Acts 1944, No. 67 did not pertain to the acquisition of the property rights, which was fully covered in Section 5. Therefore, we find that the trial court was correct in finding that the DOTD lacked authority to acquire the servitude or right of way on the Lieber property.

RETROACTIVITY[5]

The DOTD also argues that LSA-R.S. 48:303, which was added in 1955 by the same act that repealed LSA-R.S. 48:312, should be given retroactive effect. As mentioned previously (see FN 3, supra), this statute changed the law pertaining to the acquisition of property rights for limited-access highways to allow highway authonities to "acquire

[5] The plaintiff argues that the retroactivity of LSA-R.S. 48:303 should not be addressed by this court because the DOTD did not present the issue before the trial court. While we acknowledge that the issue was only marginally presented in the trial court, and the trial court did not specifically address the matter in its written opinion or judgment, we consider the DOTD's argument in the interest of justice.

any use of the property or the full ownership of it." Thus, the law pertaining to limited access highways was modified to conform with the general provisions of LSA-R.S. 48:217.

LSA-R.S. 1:2 provides that "[n]o Section of the Revised Statutes is retroactive unless it is expressly so stated." LSA-R.S. 1:2 is generally construed as being co-extensive with LSA-C.C. Art. 6, which provides that absent legislative expression, procedural and interpretive laws apply both prospectively and retroactively, while substantive laws apply prospectively only. Stelly v. *Overhead Door Company of Baton Rouge*, 94-0569 (La. 12/8/94), 646 So.2d 905; *Rousselle v. Plaquemines Parish School Board,* 93-1916 (La. 2/28/94), 633 So.2d 1235.

A two-fold inquiry is required by LSA-C.C. Art. 6. First, it must be ascertained whether the enactment expresses legislative intent regarding retrospective or prospective application. If such intent is expressed, the inquiry ends. If no such intent is expressed, the enactment must be classified as either substantive, procedural or interpretive. *St. Paul Fire & Marine Insurance Company v. Smith,* 609 So.2d 809 (La. 1992); *Cole v. Celotex Corporation*, 599 So.2d 1058 (La. 1992); *Rousselle v. Plaquemines Parish School Bd, supra.*

"Substantive" laws either establish new rules, rights, and duties or change existing ones. *St. Paul Fire & Marine Insurance Company v. Smith*, 609 So.2d at 817; *Perfect Equipment Corporation v. Louisiana Recycling, Inc.*, 26,986 (La. App. 2d Cir. 5/10/95), 655 So.2d 698. "Procedural" laws describe the method of enforcing, processing, administering or determining rights, liabilities or status. *Rollette v. State Farm Mutual Automobile insurance Company*, 619

So.2d 832, 835 (La. App. I st Cir. 1993); *State, Department of Transportation and Development v. Hellenic, Inc.*, 93-0870 (La. App. Ist Cir. 4/8/94), 636 So.2d 1004. If a statute merely prescribes the method of enforcing a right which previously existed or maintaining redress for invasion of rights, it is classified as procedural; whereas, if it creates a new obligation or night where none previously existed, it is substantive. *River Cities Construction Company, Inc. v. Barnard & Burk, Inc.*, 444 So.2d 1260 (La. App. Ist Cir. 1983), writs denied, 446 So.2d 1223, 1226 (La. 1984); *Rollette v. State Farm Mutual Automobile Insurance Company, supra.* "Interpretive" laws, on the other hand, do not create new rules, but merely establish the meaning that the 'interpreted statute had from the time of its enactment. *Segura v. Frank,* 93-1271 (La. 1/14/94), 630 So.2d 714. It is the original statute, not the interpretive one, that establishes the rights and duties. *St. Paul Fire & Marine Insurance Company v. Smith, supra*: *Prejean v. Dixie Lloyds Insurance Co.*, 94-2979 (La. 5/22/95), 655 So.2d 303; *Perfect Equipment Corporation v. Louisiana Recycling, Inc., supra.*

In the present case, the legislative act establishing LSA-R.S. 48:303 gave no indication that the legislature intended it to be retroactive. Consequently, we must classify the statute as either substantive, procedural or interpretive. It is plainly not interpretive, as the prior statute did not permit the Department of Highways to take a servitude when acquiring property for a limited-access highway. Nor can the statute be classified as procedural since it goes beyond affecting a mere "method" by which the Department of Highways could preceed. LSA-R.S. 48:303 is a substantive law which altered the rights and obligations of the Department of highways, which was previously

mandated to take property for a limited-access highway in full ownership.

Therefore, we find that LSA-R.S. 48:303 is not to be applied retroactively.

NULLITY

The trial court declared the right-of-way deed null and void on the basis of LSA-C.C. Art. 2030, which declares a contract absolutely null when it violates a rule of public order and provides that such a contract cannot be confirmed. The DOTD argues that, since LSA-C.C. Art. 2030 did not exist 1953 when the contract was executed, the trial court erred in applying it to the instant case.

LSA-C.C. Art. 2030 in its present form was added as part of the 1984 Obligations Revision. The Revision Comment to the article specifies that while it was new, it did not change the law and codified the jurisprudential rule that a contract contravening public order is absolutely null. Courts have interpreted the prohibition against contracts "contrary to public order" as including a violation of a state statute. *Wynne v. New Orleans Clerks and Checkers Union, Local 1497, International Longshoremen's Association, AFL-CIO,* 550 So.2d 1352 (La. App. 4th Cir. 1989), writ denied, 558 So-2d 1125 (La. 1990). Furthermore, according to LSA-C.C. Art. 2032, an action for annulment of an absolutely null contract does not prescribe.

Therefore, we find no error on the part of the trial court in declaring the contract null and void. See Johnson v. Kilpatrick, 569 So.2d 669 (La. App. 2d CIT. 1990).

CONCLUSION

For the reasons expressed above, the judgment of the trial court is affirmed. The case is remanded to the trial court for further proceedings. To the extent permitted by law, costs are assessed against the appellant, the DOTD.

AFFIRMED.

APPENDIX 8

The Supreme Court of the State of Louisiana

SAMUEL L. LIEBER

VS. NO. 95-C - 2355

CADDO LEVEE DISTRICT BOARD
OF COMMISSIONERS, ET AL

IN RE: Caddo Levee Dist Bd Comm,; State of Louisiana; Department of Trans & Develop.; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 27267-CA; Parish of Caddo First Judicial District Court Div."E"' Number 290,553

December 8, 1995

Denied.

WFM
HTL
CDK
BJJ

WATSON, J. would grant the writ.
VICTORY, J. recused.

Supreme Court of Louisiana
December 8, 1995

/s/ illegible
Clerk of Court
For the Court

APPENDIX 9

Samuel L. Lieber	*	Number 290,553
Versus	*	First Judicial District
	*	Court
Caddo Levee District Board	*	Caddo Parish, Louisiana
of Commissioners, et al	*	Section "C"

OPINION

Background of the Case:

The plaintiff in this case has filed suit seeking damages resulting from the "taking" of certain property by the State of Louisiana for use in a highway construction project. The property involved is located in the city limits of Shreveport at the intersection of Louisiana Highway 1 (also known as "Youree Drive") and Kings Highway.

The "taking" occurred on May 21, 1953. On that date, the plaintiff's father, Philip Lieber, executed a "right of way" in favor of the State for purposes of highway construction. (See Exhibit B) This court has previously held, and the Second Circuit Court of Appeal has affirmed, that the "taking" by this means was null in that it did not result in the acquisition by the State of the property in full ownership as required by the then applicable law.

On August 17, 1982, Dr. Lieber filed this suit seeking the value of the property taken and utilized in the project, recovery of the property not utilized in the project, and for damages. He alleges that the "excessive taking" of the property was unlawful and constitutes "inverse condemnation". Additionally, plaintiff contends that because the State treated him differently than other landowners, he perceives as similarly situated, there has been a constitutional

denial of equal protection.

This case was presented to the court on three issues: (1) the defendant's exception of prescription; (2) the defendant's exception of no right of action; and (3) the amount of damages to be awarded in favor of plaintiff. Both exceptions were referred to the trial on the merits.

The trial began on September 27, 1995 and was completed on September 28, 1995. The case was held open for the filing of briefs, with all filings having been made by November 20, 1995. The case was submitted for decision on November 21, 1995.

FINDINGS OF FACT

Prior to 1953, Youree Drive extended from Southfield Road north to Kings Highway, where it ended. On the north side of Kings Highway, was the property owned by Philip Lieber. It included property burdened by a levee, as well as property on either side.

During 1953, the State began acquiring property for the extension of Louisiana Highway 1 ("Three Drive) north of Kings Highway. On May 21, 1953, Philip Lieber executed a right of way in favor of the State for that purpose. Construction of the highway project began on February 1, 1954, and the project was completed on December 22, 1954.

Once the highway project was completed, it was apparent to Philip Lieber that the project had not utilized all of the property described in the right of way. Philip Lieber, through his attorney, requested on July 14, 1955 that the State return that portion of the property not utilized by the

project. (See Exhibit X) In its reply letter, acknowledged by Philip Lieber's attorney on July 20, 1955, the State refused his request.(See Exhibit Y)

On April 6, 1966, Dr. Samuel Lieber, the plaintiff in these proceedings, acquired the subject property from his father. (See Exhibit D-6) On April 19, 1966, Dr. Lieber likewise requested through his attorney, that the property not utilized in the project be returned. (See Exhibit ii) In a letter to Dr. Lieber dated April 25, 1966, the State effectively refused this request. (See Exhibit KK).

On August 17, 1982, Dr. Lieber filed this suit. On December 13, 1989, the State executed a quitclaim deed in favor of Dr. Lieber, remitting a portion of the property not utilized in the highway construction project , (See Exhibit I) It is suggested that the State did so based upon its opinion that ownership of the property not utilized in the highway construction project had been lost by liberative prescription.

APPLICABLE LAW OF PRESCRIPTION

This court believes that the applicable prescriptive period for the facts presented in this case is found in LRS 13:5111[1], which provides in pertinent part, as follows:

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[1] LRS 19:14 provides for the prescriptive period of two years as found in LRS 19:2.1, where the property has been taken with the consent or acquiescence of the owner. While the argument can be made that this prescriptive period is applicable to the facts presented, application of even the more liberal three year prescriptive period resolves the exception.

> "...Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years form the date of such taking..."

This statute provides that the prescriptive period begins from the date of the "taking". The State argues that the taking occurred at the time the right of way was granted by Philip Lieber in 1953, or at the very latest, at the time the construction was begun in 1954. Dr. Lieber argues that the prescriptive period does not begin to run until the landowner becomes "aware" of the taking. And because he did not know there was an "illegal taking" until 1982 or 1985, Dr. Lieber argues that prescription did not begin to run until that time.

This court must determine when the "taking" occurred in order to determine when prescription began to toll. The significant dates for purposes of considering when the "taking" occurred, are these:

May 21, 1953	Right of Way executed
February 1, 1954	Construction Began
December 22, 1954	Construction Completed
July 14, 1955	Letter from Philip Lieber to State requesting property
July 20, 1955	Acknowledgement of State's rejection of Philip Lieber's request
April 19, 1966	Letter from Dr. Lieber to State requesting property
April 25, 1966	Letter from State to Dr. Lieber refusing request

August 17, 1982 Suit filed by Dr. Lieber

The jurisprudence relied upon by this court indicates that prescription begins to run "from the date of the discovery of the taking". **Howard v. Louisiana Power and Light,** 583 So.2d 503 (La.App. 5 Cir. 1991); **Jungeblut v. Parish of Jefferson,** 485 So-2d 974 (La.App 5 Cir. 1986); **Guin v. State Department of Transportation and Development,** 391 So.2d 1367 (La.App. 4 Cir. 1980) writ denied 397 So.2d 1361 (La.1980). In determining when the plaintiff in this case learned of the loss of property upon which the claims in this suit are based, this court has compared the factual scenarios in the following cases.

In **Howard**, supra, the unimproved property owned by the plaintiffs had been assessed for property tax purposes at $68.00 per year for fourteen years. In the fifteenth year, 1978, the plaintiffs received a tax notice for $33,000.00. Completely unaware that any improvements had been made to the property, the plaintiffs retained a surveyor. The surveyor reported his findings in January of 1979, which revealed that the defendant had placed certain structures on the property in 1975, and in preceding years. Suit was giled in March, 1979. In rejecting the defendant's exception of prescription, the Fifth Circuit Court of Appeal found that the plaintiff **actually discovered** the taking only after receiving the tax notice. Because suit was filed within three years of that date, the claim was timely filed.

In **Rivet V. State of Louisiana,** 63S So.2d 295 (La.App. 5 Cir. 1994), the plaintiff owned a lot adjacent to a highway. By letter dated February 3, 1984, the State advised the Corps of Engineers that because of proposed highway construction, there would no access from the adja-

cent lots to the highway. The plaintiff had no notice of this letter. On May 7, 1985, the plaintiff made a request of the State for a driveway permit to his lot. By letter dated July 8, 1985, the State denied that request. On October 9, 1987, plaintiff filed suit. In support of its exception of prescription, the State argued that the "taking" occurred when it notified the Corps of Engineers on February 3, 1984, more than three years prior to the filing by the plaintiff. The Fifth Circuit Court of Appeal, in denying the exception, found that the plaintiff had not "discovered the taking" until receipt of the State's letter on July 8, 1985, within the three year prescriptive period.

In **Powell v. Department of Highways**, 383 So.2d 425 (La.App. 4 Cir. 1980) the plaintiff transferred a portion of his unimproved property to the State in 1959. In 1971, twelve years later, the State fenced a portion of the plaintiff's property 25 feet past the boundary described in the deed. In March of 1976, the plaintiff had the property surveyed and discovered the encroachment. The Fourth Circuit Court of Appeal found that the "discovery of the taking" occurred when the survey was made, and that because suit was filed within three years of that date, the claim was timely.

In the instant case, Philip Lieber retained an attorney in 1955 to make demand on the State for the return of the property not utilized by the construction project. Once his request was denied, he took no legal action to enforce his claim or seek damages for any loss. Dr. Lieber made a similar request in 1966. once his request was denied, he took no legal, action to enforce his claim or seek damages until August 17, 1982, some 16 years later.

In this case, Philip Lieber discovered the "taking" which gives rise to this suit, at the time of the completion of the highway construction project in 1954. Even assuming that Dr. Lieber has a separate claim for damages unaffected by the failure of Philip Lieber to pursue any claim against the State, Dr. Lieber clearly knew by 1966 at the very latest, of the "taking" and the State's refusal to return the property or compensate the plaintiff in any manner. There was no legal action taken within the three years following even this latest "discovery".

There is no question from the facts presented and the applicable law, that the "taking" of the property occurred more than three years prior to the filing of suit in this matter. The plaintiff's failure to pursue the claim based upon the representations made by the State or the plaintiff's lack of knowledge of the law, do not interrupt the tolling of prescription.

Likewise, the final two arguments made by Dr. Lieber are insufficient to defeat the exception of prescription. Based upon the facts presented, there is no evidence of any action by the State which would invoke the applicability of the doctrine of contra non valentem. And simply because the State has taken a contrary legal position in an unrelated case, there is no legal authority which mandates that the State is now estopped from making the present argument in this case.

The exception of prescription must be sustained. The remaining issues are pretermitted. The plaintiff is taxed with the court costs.

Done and Signed in chambers on this 22nd day of November, 1995.

/s/ Frank H. Thaxton,III
Frank H. Thaxton, III
District Judge

APPENDIX 10

SECOND CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

DOCKET NUMBER 28745-CA

SAMUEL L. LIEBER, M.D.
PLAINTIFF - APPELLANT
VERSUS
CADDO LEVEE DISTRICT BOARD
OF COMMISSIONERS, ET AL.
DEFENDANTS - APPELLEE

CIVIL APPEAL BY
PLAINTIFF-APPELLANT SAMUEL L. LIEBER, M.D.
FROM THE FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
HONORABLE FRANK H. THAXTON, III

ORIGINAL BRIEF FILED ON BEHALF OF
PLAINTIFF - APPELLANT,
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BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, SAMUEL L. LIEBER

May It Please the Court:

STATEMENT OF THE CASE

This Honorable Court of Appeal already has affirmed the granting of Plaintiff-Appellant's Motion for Partial Summary Judgment in this case, *Lieber v. Caddo Levee District Board of Commissioners, et al*, Docket No. 27,267, 660 So. 2d 188 (La. App. 2d Cir. 1995). In doing so, this Honorable Court declared the 1953 right-of-way agreement over Plaintiff-Appellant's 2.09-acre tract of land at Youree Drive Extension and Kings Highway in Shreveport at issue in this lawsuit null and void *ab initio* as a violation of the law governing the Louisiana Highway Department and its successor, the Louisiana Department of Transportation and Development (DOTD), Defendant-Appellee. The Louisiana Supreme Court denied DOTD's application for writs in December, 1995.

The current appeal is being presented to this Honorable Court because the Trial Court subsequently denied Plaintiff's claim for damages arising from the illegal right-of-way agreement by ruling that the claim has prescribed. Therefore, the Trial Court, while originally finding that the right-of-way agreement was illegal, now has denied Plaintiff the right to claim damages because of the Highway Department/DOTD's wrongful withholding from Plaintiff of any use of his valuable commercial property for 42 years. Plaintiff submits that the Trial Court has manifestly erred in this ruling on prescription because it (1.) ignores Plaintiff's cause of action for inverse condemnation arising from the illegal right-of-way agreement, (2.) confuses the foundation of Plaintiff's cause of action for inverse condemnation with

Plaintiff's separate cause of action for excess taking, and (3.) misapplies the goveming law to the particular undisputed facts of the case.

Following trial on the merits on damages September 27 and 28, 1995, the Trial Court ruled on November 22, 1995, that Plaintiff's claim for damages for inverse condemnation under La. R. S. 13:5111 had prescribed as having been filed more than three years after discovery of the 'taking" by the Highway Department. The Trial Court characterized the facts necessary for discovery of the 'taking" to have occurred upon completion of the Youree Drive Extension Highway Project in 1954. However, at trial Plaintiff had testified that he had not been able to discover the illegal basis of the right-of-way agreement until between 1982 and 1985 because the Highway Department and DOTD consistently had misstated and misrepresented the true facts regarding the necessity of the property for highway purposes.

Any facts known to Plaintiff prior to 1982 concerning the use of his property by either the Highway Department or DOTD were limited to the permitted commercial uses being allowed to third parties by the Department/DOTD, while such uses were denied to Plaintiff. Plaintiff's claim for these permitted non-highway uses constituted an excess taking, which Plaintiff argues constitutes a continuing tort.

However, it is Plaintiff's position that he had a separate, distinct cause of action for inverse condemnation arising from the illegal right-of-way agreement, which he reasonably had not been able to discover over the misstatements and misrepresentations of the HighwayDepartment/ DOTD until between 1982 and 1985. The three-year preA-

scriptive period for a claim for inverse condemnation under R. S. 13:5111 does not begin to run until the date of discovery of the illegal taking. Plaintiff's evidence at trial shows that Plaintiff, Samuel L. Lieber, M. D., did not discover the illegality of the 1953 right of way deed obtained by the Department of Highways from Philip Lieber until after the date of Plaintiff's filing of his original petition on September 17, 1982. An amended petition was timely filed within three years, on July 12, 1985. As Dr. Lieber testified, he believed the repeated representations by Highway Department officials that his entire property was needed for highway purposes. Therefore, it is Plaintiff's position that he timely filed his amended petition alleging the illegality of the right-of-way agreement within three years of the date of his first reasonable discovery of the illegal taking.

Further, it is Plaintiff-Appellant's position that instead of one 'taking" of Plaintiff's property rights by the Highway Department/DOTD, there were two. The first occurred when the Highway Department obtained in 1953 what was discovered much later by Plaintiff to be an illegal right-of-way agreement over the property. The second occurred when the Highway Department permitted third party commercial use of what the Department claimed was necessary highway property, thereby constituting an "excess taking." A "taking" has been held by this Court of Appeal to be "any substantial interference with the free use and enjoyment of property." (*Simmons v. Board of Commissioners of Bossier Levee District*,) 624 So. 2d 935 at 951 (La. App. 2d Cir. 1993), emphasis by the Second Circuit Court of Appeal.

Therefore, Plaintiff-Appellant submits that he *has* met the test for prescription under inverse condemnation announced by the Trial Court: three years from the date

of discovery of the illegal "taking". The Trial Court manifestly erred in confusing (1.) the 'taking" arising from the illegal right-of-way agreement (unknown to the Plaintiff at the time), and (2.) the Highway Department's permitted third party commercial use of the subject Lieber property (which constituted an "excess" taking).

Moreover, it is Plaintiff's position that under the now-final ruling that the right-of-way was illegal, he should be awarded damages at least for that portion of his property covered by the present Youree Drive Extension in order to restore Plaintiff to the position before the right-of-way was executed.

FACTS

Plaintiff submits that through its prior ruling in this case this Honorable Court already has established some critical undisputed facts. In 1953, the Louisiana Department of Highways acquired numerous parcels of land for the construction of Youree Drive Extension in Shreveport, Louisiana, a limited access highway.

Philip Lieber, father and predecessor in title to Plaintiff, Samuel L. Lieber, M. D., owned a 2.09-acre parcel of land at the intersection of Kings Highway and the planned Youree Drive Extension. Instead of acquiring the parcel in fee, as required for limited access highways by the governing statute at the time, La. R. S. 48:312, the Department of Highways deliberately chose to acquire only a right-of-way over the subject Lieber property. The Department made this deliberate choice despite the fact that the Department was at the same time filing expropriation suits for acquisition in fee simple of numerous other parcels

of land for this same highway project. Please see Plaintiff's Exhibit AAA - Revised. The Department never disclosed to Philip Lieber either its legal constraint on acquisition, or admitted its violation of the law in the degree of ownership acquired, which legal violation was unknown to Philip Lieber or Plaintiff until after 1982.

The reasons why the Department of Highways presented Philip Lieber with the right of way deed in 1953 are clear. In the record is Plaintiff's Exhibit YY, an October 6, 1952 letter from C. L. Paschal, Senior Right of Way Agent for the Department of Highways, to M. F. Collier, Right of Way Agent, filed with Plaintiff's Motion to Reconsider. The Department of Highway's own letter states in pertinent part:

> "... we have used the Right of Way Deed for this transaction because there is a question as to the title to the property and a Right of Way Deed does not warrant the title."

Of course, Defendant has raised no question as to Plaintiff's title or that of Philip Lieber. The evidence merely shows that the Department of Highways deliberately chose the method by which it sought to acquire property rights from Philip Lieber for this highway project.

Following the completion of Youree Drive Extension in 1954, Plaintiff's father and later, Plaintiff himself, began a nearly 30-year effort to have the Department of Highways and DOTD release the unused portion of the subject Lieber property. However, despite the voluminous record of the years of requests made by the Liebers (52 exhibits), the Department of Highways and DOTD consistently refused to release the unused property by constantly

stating that it was necessary for highway purposes. This refusal continued despite the fact that the Department of Highways and DOTD admittedly allowed third parties repeatedly to use the subject Lieber property for economic gain, including parking for private trolley company use, parking for adjacent businesses, automobile sales to the public, and Christmas tree sales. The Liebers, on the other hand, were denied any economic benefit from the property during this entire period by DOTD and its predecessor.

Further, at the same time that DOTD and its predecessor were allowing third parties economic benefit from the subject Lieber property, the governmental entities also were allowing others (including the then Department of Highway's own Commissioner, Sherwood Loe) to make economic use of similarly situated property located at the northern end of this same highway project.

Finally, despite these clear facts, but having received no satisfactory response from the Department of Highways and DOTD to its requests for release of the unused property, Plaintiff filed suit in 1982. Thereafter, Plaintiff discovered that the Department of Highways in 1953, at the same time as the acquisition of its right-of-way from Philip Lieber, had argued vigorously in the *Bessie Barrow* case (*State of Louisiana, through the Department of Highways vs. Mrs. Bessie Harman Barrow,* Docket No. 115708, First Judicial District Court Opinion 11-12-53; affirmed 238 La. 887, 116 So. 2d 703 (1959)) in the face of a plea by another property owner on this same Youree Drive Extension highway project that the Department of Highways limit its acquisition of her property to a right-of-way, that the Department was required by law (La. R. S. 48:312) to acquire the property for this limited access highway in fee

only. The First Judicial District Court and this Honorable Court agreed with this interpretation of law by the Department of Highways.

Following this discovery, Plaintiff amended his petition in 1985, alleging that the right-of-way deed acquired by the Department of Highways from Philip Lieber was and is illegal and void as being contrary to public order, namely, the governing law of La. R. S. 48:312. By granting Plaintiff's Motion for Partial Summary Judgment on this issue, the Honorable First Judicial District Court, Judge Frank Thaxton, III, agreed, following the persuasive precedent argued by DOTD's own predecessor, the Department of Highways, in the *Bessie Barrow* case. This Honorable Second Circuit Court of Appeal upheld the Trial Court, ruling through a unanimous panel.

C. The Trial Court erred in apparently dismissing the persuasive precedent of the *Barrow* decision In the present case on the merits, when *Barrow* had been relied upon in granting Plaintiff's Motion for Partial Summary Judgment.

Trial Court's Opinion:

"And simply because the State has taken a contrary legal position in an unrelated case, there is no legal authority which mandates that the State is now estopped from making the present argument in this case."

Record evidence: It is unclear to Plaintiff-Appellant

what case the Trial Court is referring to in this statement. If the reference is to the *Barrow* decision of the First Judicial District Court as persuasive precedent of the position of the Highway Department on the applicable law in 1953, then the statement is contrary to the position previously taken by the Trial Court in granting Plaintiff's Motion for Partial Summary Judgment. It the reference is to the Barrow/Chandler S & L Marine property at the northern end of Youree Drive Extension, then Plaintiff shows the facts speak for themselves: that property, like the subject Lieber property, is located within the confines of the highway right-of-way, yet the landowner was allowed commercial use of his property in that instance, when such use was,denied to the Liebers.

2. The Trial court manifestly erred, through its ruling on prescription, in denying damages to Plaintiff as an effect of the finding that the 1953 Right-of-Way Agreement was absolutely null.

Given the finality of the judgment that the 1953 right-of-way is absolutely null, the Trial Court manifestly erred through its ruling on prescription in denying damages to Plaintiff as an effect of this finding under La. C. C. Art. 2033.

La. C. C. Art. 2033 provides, in pertinent part:

> "An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. **If it is impossible or impracticable to make restoration in kind,**

it may be made through an award of damages." (Emphasis added.)

In what may be a case of first impression on this issue as applied to the facts presented in this case, Plaintiff respectfully shows that it is impossible to make complete restoration "in kind" to the situation that existed before the illegal contract was made.

First, it is impossible to return the entire property subject to the illegal right-of-way to Plaintiff. Youree Drive Extension has been paved over a portion of the tract, for which Plaintiff should receive compensation in the amount suggested by Plaintiff's expert appraiser, Robert L. Russell, MAI. For the roadbed itself, which never will be returned to Plaintiffs use, the value in 1985 (date of discovery of the illegal taking) is $200,000.00. Adding legal interest from the date of taking, December, 1954, Mr. Russell calculated a value of $2,980,000.00 for the invalid taking of this Tract 1. (Plaintiff's Exhibit "DDD," p. viii.) The usual measure of damages in inverse condemnation cases is the value of the property or property right as of the date of discovery of the taking. Please see *Chenevert v. Louisiana State Department of Highways,* 345 so. 2d 960 (La. App. 4th Cir. 1977); *Jungeblut v. Parish of Jefferson*, 485 S. 2d 974 (La. App. 5th Cir. 1986); *Powell v. Department of Highways, supra.*

A damage award for inverse condemnation includes legal interest from the date of taking. *A. K. Roy, Inc. v. Board of Commissioner for Pontchartrain Levee District,* 117 So. 2d 60 (La. 1960); *Reddel v. State Department of Highways*, 340 So. 2d 1010 (La App. 4th Cir. 1976); *Simmons v. Board of Commissioners of Bossier Levee District, supra.*

Second, merely to restore the remainder of Plaintiff's property denies to Plaintiff the valuable commercial use he could have made of the property since the time of the illegal right of way in 1953.

The effect of the Department of Highways obtaining the 1953 right-of-way over the subject Lieber proerty and holding it until the denial of writs by the Louisiana Supreme Court in December, 1995 (except for the portion quitclaimed by DOTD in 1989) is no different from the Department having illegally held Plaintiff's funds for over 42 years. To restore only a portion of the funds, without legal interest and without recognition of the damages to Plaintiff which resulted from denial of commercial use of this valuable piece of property at one of Shreveport's busiest intersections, is not enough under law. See, for example, *Nicaud v. Fonte*, 503 So.2d 79 (La. App. 5th Cir. 1987), awarding the return of a deposit of money made under an absolutely null contract, plus legal interest on the deposit returned.

It particularly is unjust to prevent Plaintiff even from claiming damages as an effect of the illegal right-of-way under the Trial Court's ruling on prescription. Under La. C. C. Art. 2032 "[an] action for annulment of an absolutely null contract does not prescribe." Therefore, it follows from a matter of law and justice that a claim for damages due to the impossibility or impracticability of making restoration in kind under La. C. C. Art. 2033 does not prescribe, either.

Plaintiff's valuable property rights are protected by the Constitutions of the United States and the State of Louisiana. The Fourteenth Amendment of the United States Constitution provides, in part, as follow:

"No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

Art. 1, Section 10, of the United States Constitution prohibits a state from passing a retroactive or ex post facto law that would destroy a vested, right or impair the obligation of contract.

The Louisiana Constitution provides, in part, in Article 1, Sections 2 and 4, as follows:

"Sec. 2. Due Process of Law
No person shall be deprived of life, liberty or property, except by due process Of law.

Sec. 4. Right to Property
Every person has the right to acquire, own, control, use, enjoy, protect and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
Property shall not be taken or damaged by the state or its political subdivisions except for Public Purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question."

As stated by the Honorable First Judicial Court through Judge Charles Scott in the opinion rendered March 3, 1993, in *Caddo-Bossier Parishes Port Commission versus Tensas Delta Land Co.*, et al, Number 382,509 (quoted at Appeal Record, Vol. II of II P. 490):

"Article 1, Section 4 of the Louisiana Constitution was intended to give 'far-reaching new protection' to the right of citizens to own and control private property." *State V. 1971 Green GMC Van,* 354 30.2d 479 (La. 1977). This language in Article 1 goes beyond other state constitutions, including the 1921 constitution of the State of Louisiana and the federal constitution in limiting the power of government to regulate private property. *State*, supra; L. Jenkins, *The Declaration of Rights,* 21 Loy. L. Rev. 9, 19 (1975); L. Hargrave, *The Declaration of Rights of the Louisiana Constitution* of 1974, 35 La. L. Rev. 1 (1974); *Guidry v. Roberts*, 335 So. 2d 438 (La. 1976).

Recovery of damages for violations of the above constitutional mandates, therefore, is to the "full extent of loss." It has been held that the determination of what will compensate "to the full extent of the loss":

> "must be made on the basis of the facts of each case and in accord with the uniqueness of the property right taken." *Naquin v. Department of Transportation and Development Of State of Louisiana,* 604 So. 2d 62 at 65 - 66 (La App. 1st Cir. 1992), writ denied,

Plaintiff respectfully submits that the Trial Court has erred in denying Plaintiff's opportunity to claim damages "to the full extent of the loss."

3. The Trial Court manifestly erred in failing to apply the doctrine of contra non valentem under the undisputed facts of this case as an equitable bar to DOTD's defense of prescription. The facts necessary to put Plaintiff on notice of his claim of inverse condemnation arising from the illegal basis of the Right-of-Way Deed obviously were in a better position to be known to the representatives of the Highway Department and DOTD (Plaintiff's Exhibit "AAA - Revised"), but wrongfully were denied to Plaintiff.

Without repeating all of the arguments set forth in Specification of Error No. 1 above, Plaintiff respectfully suggests that any consideration of prescription in this case also consider the application of the doctrine of contra non valentem agere nulla currit praescriptio, to the factual situation of this case. As in the case of *Powell v. Department of Highways, supra*, the doctrine applies where the debtor "has committed other acts which tend to hinder, impede or prevent the creditor from ascertaining knowledge of the

APPENDIX 11

Judgment rendered October 30, 1996.
Application for rehearing may be
filed within the delay allowed by art.
2166. La. C.C.P.

No. 28.745-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

SAMUEL L. LIEBER — Plaintiff-Appellant

Versus

STATE OF LOUISIANA, DEPARTMENT
OF TRANSPORTATION & DEVELOPMENT
Defendant-Appellee

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 290,553

Honorable Frank H. Thaxton, III, Judge

* * * * *

WEINER, WEISS, MADISON
& HOWELL — Counsel for
By: Neil T. Erwin — Plaintiff-Appellant

RONALD J. BERTRAND — Counsel for
Defendant-Appellee

* * * * *

Before MARVIN. HIGHTOWER and PRICE. JJ.

MARVIN, C. J.

In this action for damages and attomey fees founded on the wrongful taking, of about two acres of Lieber property in the 1950s for the construction of the extension of La. Highway I in Shreveport (Youree Drive north of its intersection with Kings Highway) by the State Department of Highways (now DOTD), Dr. Lieber, successor in title to his father who owned the property when the taking occurred, appeals a judgment sustaining the State's plea of prescription and rejecting Dr. Lieber's demands. La. Const. art. 1, § 4; La. R.S. 13:5111.

We amend and affirm.

FACTS

Dr. Lieber's father, Philip Lieber, owned the property in question in 1953 on which existed a portion of a levee about 86 feet in width that had been formally abandoned by the Caddo Levee District years after it was constructed. That levee was a part of a system that protected the area against flooding by the Red River. Some portions of the original system had to be redesigned because of changes in the river, resulting in the abandonment of portions of the levee. *See Lieber v. Hamel*, 446 So. 2d 1240 (La. App. 2d Cir. 1983), *writ denied.*

According to a 1952 internal Department of Highways document discussing the existence of the levee and the proposed highway extension:

> This area was apparently never dedicated for public use and when the levee is removed the title will

> apparently revert to Philip Lieber. It would seem that the area as it now exists is useless to the owner and ***we have used the Right of Way Deed for this transaction because there is a question as to the title to the property and a Right of Way Deed does not warrant the title.*** Under a Right of Way Deed the owner will also retain whatever mineral rights he may have. If possible we would prefer to secure this parcel of right of way by donation on account of the question as to the title. (Our emphasis.)

In 1953 Philip Lieber executed a right of way deed to the State for $2.500 describines the two acres in question. The State removed the levee and thereafter completed the extension of the highway in December 1954.

Soon after the project was completed, Philip Lieber realized that some of the property included in the right of way deed had not been used in the project. On July 14, 1955, Lieber's lawyer wrote the State requesting that the right of way be "confined to that part of the property actually occupied by the completed highway so that [Lieber] might make other uses of the remainder of the property." The Department quickly denied this request, according to a letter written by Lieber's lawyer to his client on July 20, 1955, quoting for Lieber the Department's response:

> The Department feels that it is to the Department's advantage to retain all of the right-of-way obtained from Mr. Lieber and therefore cannot favorably consider Mr. Lieber's request.

For about a year thereafter, Philip Lieber personally corresponded with the director of the Highway Department

and with other state officials, explaining his desire to donate a portion of the unused acreage to a local church and to build a medical clinic for his son and other young doctors on the rest of the land, situated at what was becoming a major traffic intersection with heavy commercial development. Lieber also complained that the Shreveport Railways Company (municipal trolley system) was being allowed to use the vacant land to provide its customers with free parking, without Lieber's consent.

By letter of April 17, 1956, the director of the Highway Department inforrried Lieber that

> this property was purchased for adequate "sight distance" [at the busy intersection] and I understand that permission was granted the Shreveport Railways Company by Mr. Lane Mitchell for its use as a parking lot. Such a use, however, is contrary to Highway [Department] policy and I am today writing the Shreveport Railways Company that they can no longer occupy this site as it is our plan to beautify this section in accordance with [federal] requirements. (Our brackets.)

Lieber took no further action thereafter, in or out of court, according to this record.

About ten years later, on April 6, 1966, Lieber sold to his son, Dr. Samuel Lieber, his interest in several tracts of Shreveport land, including the land at Youree Drive and Kings Highway, over which Lieber had granted the right of way to the State in 1953. The land was sold "without warranty but with substitution and subrogation to all rights and actions of warranty against all former proprietors of the

property herein conveyed, together with all rights of prescription, whether acquisitive or liberative, to which [Philip Lieber] may be entitled[.]"

When Dr. Lieber acquired the property, both he and his father regarded the 1953 right of way deed as a valid and binding document. Their only complaint at that time concerned the fact that the State did not use all of the land described in the deed for the extended roadway, the public purpose for which the right of way was granted. In correspondence with the State from 1966-1969, both with and without counsel, Dr. Lieber questioned the State's assertions that the excess property was needed for a public purpose, and complained of one or more Shreveport civic clubs being allowed to use the property to sell Christmas trees. This correspondence ended cordially, but unfavorably to Dr. Lieber, in December 1969.

Dr. Lieber made no further formal complaints or demands about the Youree Drive property from 1969 until 1982, when he filed this action for declaratory judgment to determine the ownership of several tracts of "levee land" in Shreveport, including this land and another levee tract on 70th Street that became the subject of other litigation with the Hamel family. *See Lieber v. Hamel.* cited *supra.* It is unclear who the original defendants were in the 1982 petition, which Dr. Lieber filed in proper person, though they apparently included the Hamels and the Caddo Levee District Board of Commissioners.

By amended petition filed in July 1985, Dr. Lieber alleged for the first time that the 1953 right of way agreement between his father and the State for the extension of Youree Drive was invalid because the "State Highway

Department erred in buying a servitude and not fee simple[.]" Dr. Lieber alleged that the State's right of way agreement with his father was an absolute nullity under forrner La. R.S. 48:312, which required the State to take fee title, and not merely a servitude or right of way, when acquiring property rights for a limited-access highway. The statute was in effect in 1953, but was repealed in 1955.

Still representing himself in 1985, Dr. Lieber requested a declaratory judgment recognizing that the "State Department of Highways . . . [has] no bona fide right of way" over the property, and that the State's exercise of the'"illegal servitude" violated Dr. Lieber's due process and equal protection rights.

Dr. Lieber thereafter retained counsel, who filed additional amended petitions from 1988-1991, alleging with more particularity the "inverse condemnation" claim asserted by Dr. Lieber in his pro se pleadings, based on the invalidity of the 1953 right of way deed.

For the first time in the 1988 amended petition, Dr. Lieber alleged that only a portion of the two-acre tract described in the right of way deed was used in the highway project. He claimed that the State had denied the Liebers the right to use the remaining acreage while allowing third parties to make commercial use of it, thereby violating the Liebers' constillutional rights to compensation for the taking of their property and to due process and equal protection of law. In addition to his claims for damages and attomey fees for both the "illegal" taking of a servitude instead of fee title at the outset, and for the "excess" taking of more land than was actually used in the highway project, Dr. Lieber sought to have full ownership of the excess land restored to him.

In December 1989, the State quitclaimed its interest in about two thirds of the part of the tract that was not used by the State for the highway extension. After unsuccessfully arguing that the quitclaim deed was intended to serve as a compromise of all of Dr. Lieber's claims, the State later admitted that it had no written compromise agreement with Dr. Lieber. The State further admitted in the pre-trial order that it "**asserts no facts is its basis for claiming the continued utility of a servitude over the unpaved portion of the subject Lieber property at Youree Drive and Kings Highway not covered by the ... Quitclaim Deed** ... other than the potential use of the servitude area by the City of Shreveport in proposed improvements to Kings Highway." Our emphasis. Dr. Lieber thereafter reiterated his claim that the State "should return the entire [unused portion of the] property." Our brackets.

While the validity of the 1953 right of way agreement was being litigated, the State filed exceptions of no right of action and prescription to Dr. Lieber's *damage* claims. The exceptions to, and the merits of, those claims were tried in September 1995, after this court affirmed the partial summary judgment declaring the 1953 right of way agreement null in *Lieber v. Caddo Levee District Board of Commissioners.* 27.267 (La. App. 2d Cir. 8/23/95), 660 So. 2d 188. *writ denied.*

The State's plea of prescription is not directed to Dr. Lieber's demand that the State relinquish any interest it may have in the portion of the "excess" land which was not included in the quitclaim deed. The State has candidly admitted having no factual basis for claiming that this land is needed for a public purpose. Under these circumstances, we shall amend the judgment to declare that the State has no

possessory interest in the portion of the two acres not used by the State in the construction and maintenance of the highway. Our references hereafter to the "claim for excess taking," and to the prescriptive period applicable to that claim, shall be limited to the claim for *damages and attorney fees* for the excess taking.

PRESCRIPTION OF DAMAGE CLAIMS

At the hearing on the exceptions, Dr. Lieber admitted that both he and his father knew soon after the project was completed in 1954 that some of the land described in the 1953 right of way deed, which the Liebers then regarded as valid, had not been used in the project. Dr. Lieber testified that he knew the State had refused his father's requests to relinquish its interest in the excess land, not only when he bought the property from his father in 1966, but "***from 1955 on.*** " Our emphasis. His explanation for having waited until 1982 to file this action, in which the excess taking claim was first raised by the amended petition filed in 1988, was that he was "too busy" with litigation over other Shreveport properties in the interim. See, for example, *Lieber v. Hamel,* cited *supra*; *Lieber v. Rust*, 3 88 So. 2d 836 (La. App. 2d Cir. 1980), *affirmed*, 398 So. 2d 519 (La. 1981) and *Lieber v. Ownership of Real Property Located in Caddo Parish*, 501 So. 2d 957 (La. App. 2d Cir. 1987), *writ denied.*

In contrast to his admission that he had known of the **excess** taking since 1955, Dr. Lieber testified that he first discovered the **illegality** of the 1953 right of way agreement under former R.S. 48:312. which was repealed in 1955. At some unspecified time between the filing of his original and first amended petitions in this action in 1982 and 1985, respectively. During that time, and without the assistance of

a lawyer, Dr. Lieber researched the public records in Caddo Parish and

> realized that there were suits related to the [Youree Drive extension project]. And when I read those suits it opened my eyes that the Highway Department argued that they simply had to buy fee title [from other landowners] ***because the laws stated so***, and I thought that it was illegal for them to buy a servitude [from my father] because of that. (Our emphasis and brackets.)

Dr. Lieber thereafter alleged the illegality of the 1953 right of way deed in his amended petition filed in July 1985. The State did not raise the exception of prescription as a bar to litigating the *validity* of the deed, apparently because the deed was alleged, and later found, to be an absolute nullity not subject to liberative prescription. See La. C.C. arts. 2030-2032 and *Lieber v. Caddo Levee District, supra*, 27,267 at p. 10; 660 So. 2d at 193. See also *Byrd v. Byrd*, 230 La. 260, 88 So. 2d 214 (1956).

The State's plea of prescription to the claims for damages and attorney fees is founded on La. R.S. 19:14, 19:2.1 and 13:5111. These statutes respectively

> - recognize that the state may acquire private property for a public purpose without formal expropriation proceedings, and without *prior* payment of constitutional compensation, by constructing public facilities on the property in good faith and with the consent or acquiescence of the owner (R.S. 19:14, enacted in 1976 to codify the jurisprudential doctrine of *St. Julien v. Morgan L. & T Railroad Co.*, 35 La. Ann. 924 (1983));

- require the owner in such circumstances to bring his claims for compensation and for damages caused by the taking within two years from "the date on which the property was actually occupied and used" for a public purpose (R.S. 19:14, incorporating by reference the provisions of R.S. 19:2.1, which apply to takings by formal expropriation proceedings);

- or alternatively, require that actions for compensation including reasonable attorney fees, "for the taking of property by the (state], other than through an expropriation proceeding," be brought within three years from "the date of such taking." (R.S. 13:5111, the substance of which was enacted as R.S. 13:5061 in 1972).

Notwithstanding the literal wording of the statute, the three-year prescriptive period of § 5 111 is deemed to begin only when the owner *discovers the fact* that his property has been taken. *Powell v. Department of Highways,* 383 So. 2d 425 (La. App. 4th Cir. 1980), *writ denied*; *Jungeblut v. Parish of Jefferson*, 485 So. 2d 974 (La. App. 5th Cir. 1986).

The State also filed an exception of no right of action, asserting that the right to claim compensation and damages for the taking of property is personal to the property owner at the time of the taking unless the right is expressly transferred to a subsequent owner. See generally *McCutchen v. Texas & P. Ry. Co.*, 118 La. 436, 43 So. 42 (1907); *Brooks v. New Orleans Public Service, Inc.*, 370 So. 2d 686 (La. App. 4th Cir. 1979), *writ denied*

TRIAL COURT RULING

The trial court sustained the prescription exception

without reaching the exception of no right of action. Because the record supports the court's ruling that the damage claims have prescribed, we shall assume solely for discussion purposes, without deciding that Dr. Lieber has a right of action to bring those claims.

The trial court applied the three-year prescriptive period of R.S. 13:5111, rather than the two-year period of R.S. 19:14, giving Dr. Lieber the benefit of the longer period. Notwithstanding the invalidity of the 1953 right of way deed, the trial court essentially found that the Liebers knew the State had taken the land that was actually used for the extension of Youree Drive when the extension project was completed in 1954. With respect to the land that was not used in the project, the court found that prescription began in 1955. When the Liebers learned of the State's refusal to relinquish the excess land.

Dr. Lieber argued in the trial court that prescription on his claims was interrupted under the doctrine of *contra non valentem.* He maintained that prescription on his inverse condemnation claim arising from the defective right of way agreement did not begin to run until he discovered in the early 1980s, the *law* which rendered the agreement null. Emphasizing that his father did not know of this law when he granted the right of way to the State, Dr. Lieber claimed that the State knew or should have known of this law when its agents or employees "refused [to buy from] my father fee title, [and instead] bought a servitude." Our brackets.

Dr. Lieber made a similar argument on the excess taking claim, contending prescription was interrupted by the State"s repeated representations. over a period of decades, that all of the land was needed for a public purpose.

The trial court deemed *contra non* inapplicable, saying neither the Liebers' "lack of knowledge of the law" nor the State's representations regarding the *reasons* for the excess taking served to interrupt prescription. These rulings form the crux of Dr. Lieber's appeal.

DISCUSSION

Inverse Condemnation Claim

Before addressing Dr. Lieber's *contra non valentem* arguments, we briefly note that the record does not support his assertion that the State affirmatively "refused to buy fee title" from Philip Lieber in 1953. There is no evidence in this record to show or suggest that Lieber desired or offered to sell the property outright, notwithstanding that he was then the president of a local savings and loan association with many years of experience in real estate dealings, both professionally and personally.

The internal Department of Highways correspondence in 1952 mentioned above suggests two *benefits* to Lieber in conveying only a servitude rather than full ownership to the State: He would not be expected to warrant title to the leveeburdened land, which he apparently acquired through liquidation proceedings involving a failed real estate development company, and he would retain the mineral rights. Ordinarily, the landowner *prefers* to grant lesser rather than greater property rights to the expropriating authority. See, for example, *State Dept. of Highways v. Olinkraft, Inc.*, 350 So. 2d 865 (La. 1977) (on rehearing) and *Red River Waterway Commission v. Fredericks*, 566 So. 2d 79 (La. 1990).

Notwithstanding that the State's acquisition of a servitude from Lieber for this limited-highway access project clearly violated former R.S. 48:312, which was in effect for only a relatively short time, 1944-1955, we simply cannot ascribe any ill motives to the State in this particular case. According to this record, and even without the invalid right of way deed, it is apparent that the State's initial "appropriation" or "inverse condemnation" of Lieber's property for the extension of Youree Drive was done in good faith and for a public purpose. Lieber's sole objection to the project, regarding the quantity of the land taken, arose only after the project was completed.

Under the law in effect at the time of the taking, the State may be said to have acquired a valid interest in the Lieber property under the *St. Julien* doctrine, at least as to that part of the property actually used for the extension of Youree Drive. See generally *State Dept. of Highwavs v. Champagne*, 371 So. 2d 626, 631 (La. App. 1st Cir. 1979); *reversed in part on other grounds*. 379 So. 2d 1069 (La. 1980). This is true even if Philip Lieber's acquiescence in the initial taking resulted from his erroneous belief that the 1953 right of way agreement he signed was legally valid. See and compare *Veillon v. Columbia Gulf Transmission Co.*, 192 So. 2d 646 (La. App. 3d Cir. 1966), *writ denied.*

At least as to the property actually used for a public purpose, which the State could have validly taken even without a right of way deed, Lieber was relegated to a claim for compensation, which was then regarded as a personal action subject to a ten-year prescriptive period under former La. C.C. art. 3544 (now Art. 3499). See and compare *McCutchen v. Texas & P. Ry. Co., cited supra*, and *Maxfield v. Gulf States Utilities Co.*, 65 So. 2d 615 (La. App. 1st Cir.

1953). Lieber did not bring a claim for compensation, nor an action to challenge the extent of the taking, even after the State refused to relinquish its rights to the excess land in 1955.

Contra Non Valentem: Ignorance of Law . v. Ignorance of Facts

Dr. Lieber argues that prescription on the inverse condemnation was interrupted until the early 1980s, when he discovered a *legal* basis for arguing that the right of way deed signed by his father in 1953 was invalid. He makes a similar argument on the excess taking claim, essentially contending that both he and his father were "lulled" into refraining from legal action regarding the land that was not used in the 1954 state project by the State's repeated [mis-]representations that the excess property was needed for a public purpose, such as to provide adequate sight distance at the intersection or to incorporate a nearby city street into the highway plan as a service road.

These arguments miss the important distinction between ignorance of the *facts* giving rise to a legal claim. And ignorance of one's *legal rights* under the known facts. While factual ignorance may prevent the running of prescription in some circumstances, ignorance of the law does not. See *Hawthorne v. La. Dept. of Public Works*, 540 So. 2d 1261 (La. App. 3d Cir. 1989), *writ denied*; *Knighten v. Knighten*, 447 So. 2d 534 (La. App. 2nd Cir. 1984), *writ denied*; and Hampton v. Kroger Co., 27,073 (La. App. 2d Cir. 6/21/95), 658 So. 2d 209, *writ denied*.

The situation here is analogous to *Hawthorne*. There, the court stated:

> [P]laintiffs ... were aware of the permanent flooding of their respective properties since the spring and summer of 1972, when the water first failed to subside and drain away as it had done prior to the construction of the Jonesville Lock and Dam. ***It was only their rights under these known facts that plaintiffs were allegedly unaware of until such time as the Boothe case was decided*** [by the third circuit in 1979,] ... having relied ... until such time ... upon prior communications from the Corps of Engineers which supposedly indicated that no compensation was due to landowners ... whose property was inundated as a result of the construction of the Jonesville Lock and Dam....
>
> ... [P]rescription on plaintiffs' claims [under R.S. 13:5111] began to run, at the latest, at the end of the summer of 1972, at which time ... plaintiffs were fully aware of the permanent inundation of their properties .... Hawthorne filed his suit [in] 1981, and the Coopers' suit was filed [in 1980]. Nothing prevented plaintiffs from instituting suit on an earlier date, as was done by the plaintiffs in *Boothe*. ***They chose not to do so and their misunderstanding, if any there be, as to their legal rights did not toll the running ofthe prescriptive period under R.S. 13:5111.***
>
> 540 So. 2d at 1263-64. Emphasis and brackets supplied; footnotes omitted.

In a different context, this court has held that one with factual knowledge that he has been extorted cannot

invoke *contra non valentem* to delay the running of prescription while he gathers evidence to corroborate his account of the facts. *Gulf States Land & Development, Inc. v. Ouachita National Bank*, 612 So. 2d 1031 (La. App. 2d Cir. 1993), *writ denied.*

Synthesizing the reasoning in *Hawthorne* and in *Gulf States*, we decline to adopt Dr. Lieber's suggestion that he and his father should be excused from having failed to take legal action on the excess taking claim for a period of years or even decades after they became aware of the factual basis for the claim. simply because they relied on their adversary's representations as to the merits of the claim.

Similarly, the Liebers knew from the outset that the 1953 right of way deed did not purport to convey full ownership of the Lieber property to the State. The *fact* that the State purchased or expropriated other property for the same project in full ownership was a matter of public record, as was the statute which rendered the 1953 agreement invalid. The delay in discovery by the Liebers of the *legal implications* of the known and knowable facts did not prevent the running of prescription on the inverse condemnation claim.

Continuing Tort Theory

Dr. Lieber argues that the State's taking of more land than was needed for the Youree Drive extension project, and allowing third parties to use the excess land to the exclusion of the Liebers, constitutes a continuing tort, as to which prescription does not begin until the tortious conduct ceases. This theory has been unsuccessfully raised in other cases involving the taking or damaging of property for a public purpose without formal expropriation proceedings. See

Lyman v. Town of Sunset, 500 So. 2d 390 (La. 1987) and *Hawthorne, supra*. As did the court in each of those cases, we decline to apply the general tort rules concerning the commencement and length of the prescriptive period to a claim against a public body which is governed by a more specific statutory provision (two years from the time damages are sustained. When private property is damaged for a public purpose, in *Lyman*, applying R.S. 9:5624 before its 1987 amendment; and three years from the date of discovery of a taking " other than through an expropriation proceeding" in *Hawthorne*, applying R.S. 13:5111).

Denial of Due Process and Equal Protection.

Dr. Lieber's claims for damages for the denial of his constitutional due process and eqiial protection rights arise from the same facts forming the basis of his claim that the property was taken or damaged by the State without the payment of just compensation. On this record, the resolution of the latter more specific constitutional claim also resolves the former, more general constitutional claims.

CONCLUSION

The claims for which Dr. Lieber seeks damages and attorney fees under La. Const. art. 1, § 4 and R.S. 13:5111 - the "inverse condemnation" of the entire two acre tract and the "excess taking" of more land than was apparently used for the state project - both arise from "the taking of property by the [state], other than through an expropriation proceeding," in the words of § 5111. These claims were brought more than three years after discovery of the *facts* involved in the respective takings. On this record, and notwithstanding the invalidity of the 1953 right of way deed, we find no basis to disturb the trial court's ruling that the damage claims asserted by Dr. Lieber, even if he has a right of action

to bring them, have prescribed. Compare *Powell v. Department of Highways* and *Jungeblut v. Parish of Jefferson,* both cited *supra.* See also and compare the pre-§ 5111 case of *Chenevert v. La. State Dept. of Highways*, 345 So. 2d 960 (La. App. 4th Cir. 1977), *writ denied.*

DECREE

We amend the judgment to declare that the State has no possessory interest in the portion of the two acres not used by the State in the construction and maintenance of La. Highway 1, as that two acres was described in the 1953 right of way deed from Philip Lieber to the State Department of Highways. In all other respects, and as amended, the judgment is affirmed. Costs of the appeal are assessed to Dr. Lieber.

AMENDED AND, AS AMENDED, AFFIRMED

APPENDIX 12

The Supreme Court of the State of Louisiana

SAMUEL L. LIEBER

VS. NO. 97-C - 0087

CADDO LEVEE DISTRICT BOARD
OF COMMISSIONERS, STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
& DEVELOPMENT

IN RE: Lieber, Samuel L.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 28745-CA; Parish of Caddo First Judicial District Court Div."E" Number 290,553

March 7, 1997
Denied.

WFM
PFC
HTL
CDK
BJJ
JPV
JTK

TRAYLOR, J. not on panel.

Supreme Court of Louisiana
March 7, 1997

/s/ illegible
Clerk of Court
For the Court

APPENDIX 13

The Supreme Court of the State of Louisiana

SAMUEL L. LIEBER, M.D.

vs. NO. 97-C-0087

CADDO LEVEE DISTRICT BOARD OF COMMISSIONERS, STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

IN RE: Samuel L. Lieber, M.D., applying for Reconsideration of this Court's Order dated March 7, 1997; to the Court of Appeal, Second Circuit, No. 28745-CA; Parish of Caddo, First Judicial District Court, Div. "E", No. 290,553.

April 18, 1997

Deny; Judgment is definitive.

BJJ
PFC
WFM
HTL
CDK
CDT
JTK

VICTORY, J., - not on panel.

Supreme Court of Louisiana
April 18, 1997

/s/ illegible
Clerk of Court
For the Court

APPENDIX 14

NULLITY Title 4

Art. 2030. Absolute nullity of contracts

A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed.

Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Art. 2032. Prescription of action

Action for annulment of an absolutely null contract does not prescribe.

Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud.

Nullity may be raised at any time as a defense against an action on the contract, even after the action for annulment has prescribed.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Art. 2033. Effects

An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages.

Nevertheless, a performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that makes the contract null. The performance may be recovered, however, when that party invokes the nullity to withdraw from the contract before its purpose is achieved and also in exceptional situations when, in the discretion of the court, that recovery would further the interest of justice.

Absolute nullity may be raised as a defense even by a party who, at the time the contract was made, knew or should have known of the defect that makes the contract null.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

APPENDIX 15

PRELIMINARY TITLE

Art. 7. Laws for the preservation of the public interest

Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

Acts 1987, No. 124, § 1, eff. Jan. 1, 1988.

Art. 11. Meaning of words

The words of a law must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning en the law involves a technical matter.

Acts 1987, No. 124, § 1, eff. Jan. 1, 1988.

Art. 12. Ambiguous words

When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Acts 1987, No. 124, § 1, eff. Jan. 1, 1988.

Art. 12. Ambiguous words

When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Art. 1759. Good faith

Good faith shall govern t whatever pertains to the obligation.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Art. 1953. Fraud may result from misrepresentation or from silence

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

ts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Art. 1954. Confidence between the parties

Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill.

This exception does not apply when a relation of confidence

has reasonably induced a party to rely on the other's assertions or representations.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

1968. Unlawful cause

The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Comment

This Article restates the basic principle contained in C.C. Art. 1895 (1870). It does not change the law.

SECTION 1. GENERAL EFFECTS OF CONTRACTS

Art. 1983. Law for the parties; performance in good faith

Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Comment

This Article reproduces the substance of C.C. Art.1901 (1870). It does not change the law.

Ar t. 3477. Precarious possessor; inability to prescribe

Acquisitive prescription does not run in favor of a Precarious possessor or his universal successor.

Acts 1982, No. 187, § 1, eff. Jan.' 1, 1983.

APPENDIX 16

SUITS AGAINST STATE
Ch. 32

§ 5111. Appropriation of property by state, parish, municipality or agencies thereof, attorney, engineering and appraisal fees; prescription

A. A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.

B. The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of Louisiana and existing statutes, and nothing in this Part shall impair any constitutional or statutory rights belonging to any person on September 12, 1975.

Acts 1975, No. 434, § 1.

APPENDIX 17
GENERAL PROVISIONS

§ 14. Possession of property; removal of facilities; objection; waiver

In any case where the state or its political corporation or subdivision has actually, in good faith believing it had authority to do so, taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property with the consent or acquiescence of the owner of the property, such owner shall be deemed to have waived his right to contest the necessity for the taking and to receive just compensation prior to the taking, but he shall be entitled to bring an action for such compensation to be determined in accordance with the provisions of Section 9 of this Tit1e, for the taking of his property or interest therein, the just compensation to be determined as of the time of the taking of theproperty, or right or right or interest therein, and such action shall proceed as if the state, its political corporation or subdivision had f iled a petition for expropriation as provided for in Section 2.1 of this Title.

In the case where any corporation referred to in Section 2 of this Title has actually, in good faith believing it had the authority to do so, taken possession of privately owned immovable property of another and constructed facilities upon upon, under or over such property with the consent or acquiescence of the owner of the property, it will be presumed that the owner of the property has waived his right to receive just compensation prior to the taking, and he shall be entitled only to bring an action for judicial determination of whether the taking was for a public and necessary purpose and for just compensation to be determined in accordance with Section 9 hereof, as of the time of the

taking of the property, or right of interest therein, and such action shall proceed as nearly as may be as if the corporation had filed a petition for expropriation as provided for in Section 2.1 of this Title.

Added by Acts 1976, No. 504, § 1.

APPENDIX 18

JUDICIAL NOTICE

Art. 202. Judicial notice of legal matters

A. Mandatory. A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state, territory, and other jurisdiction of the United States, and of the ordinances enacted by any political subdivision within the court's territorial jurisdiction whenever certified copies of the ordinances have been filed with the clerk of that court.

B. Other legal matters. (1) A court shall take judicial notice of the following if a party requests it and provides the court with the information needed by it to comply with the request, and may take judicial notice without request of a party of.

(a) Proclamations of the President of the United States and the governor of this state.

(b) Rules of boards, commissions, and agencies of this state that have been duly published and promulgated in the Louisiana Register.

(c) Ordinances enacted by any political subdivision of the State of Louisiana.

(d) Rules which govern the practice and procedure in a court of the United States or of any state, territory, or other jurisdiction of the United States, and which have been published in a form which makes them readily accessible.

(e) Rules and decisions of boards, commissions, and agencies of the United States or of any state, territory, or other jurisdiction of the United States which have been duly published and promulgated and which have the effect of law within their respective jurisdictions.

(f) Law of foreign countries, international law, and maritime law.

(2) A party who requests that judicial notice be taken and the court, if notice is taken without request shall give reasonable notice during trial to all other parties.

C. Information by court. The court may inform itself of any of the foregoing legal matters in such manner as it may deem proper, and the court may call upon counsel. to aid it in obtaining such information.

D. Time of taking notice. Judicial notice of the foregoing legal matters may be taken at any stage of the proceeding, provided that- before taking judicial notice of a matter in its instructions to the jury, the court shall i nform the parties before closing arguments begin

E. Question for court. The determination of the foregoing legal matters shall be made by the court.

APPENDIX 19
Action of Nullity

2001. Grounds in general

The nullity of a final judgment may be demanded for vices of either form or substance, as provided in Articles 2002 through 2006.

Art. 2004. Annulment for vices of substance; peremption of action

A final judgment obtained by fraud or ill practices may be annulled.

An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.

Axt. 2005. Annulment of judgments; effect of appe appeal therefrom, or

A judgment may be annulled prior to or pending an appeal therefrom, or after the delays for appealing have elapsed.

A judgment affirmed, reversed, amended, or otherwise rendered by an appellate courtmay be annulled only when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court.

An action of nullity does not affect the right to appeal.